FOR ARGUMENT

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In the

Supreme Court of the United States

October Term, 1977

No. 77-152

BETH ISRAEL HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

AMICUS CURIAE BRIEF SUBMITTED ON BEHALF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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By consent of the Petitioner and the National Labor Relations Board (attached hereto), National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter referred to as the "National Union") files this brief as Amicus Curiae.

Interest of the Amicus Curiae

The National Union represents close to 100,000 health care employees in over 350 health care institutions. This case is of vital concern to the Union and the members it represents as the right of

employees in this industry to organize and to join and assist labor organizations will be directly affected by the outcome of this case.

The decision of this Court in this matter will, of course, have a profound impact on the rights of health care employees to solicit their fellow employees to join them in becoming members of Unions. If the position of the National Labor Relations Board (hereinafter referred to as the "Board") is not upheld, Unions and employees in the health care industry will be deprived of rights that, for many, were only recently secured from Congress when the latter passed the 1974 Amendments to the Labor-Management Relations Act (hereinafter the "Act") which provided for the first time, coverage under the Act for employees employed by non-profit hospitals.

The National Union filed an amicus brief with the Board in St. John's Hospital and School of Nursing, Inc., 222 NLRB No. 182, 91 LRRM 1333, the case in which the Board established its current policy concerning solicitation and distribution rules in the health care industry. In addition, one of the Locals of the National Union was the charging party before the Board in another case involving the right of health care employees to solicit and distribute Union literature. The Board's order in the latter case was enforced in pertinent part in Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F.2d 208 (CA 7 1977).

ARGUMENT

THE COURT BELOW CORRECTLY ENFORCED THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING AND MAINTAINING A NO-SOLICITATION/NO-DISTRIBUTION RULE WHICH PROHIBITED EMPLOYEES FROM SOLICITING UNION SUPPORT DURING NON-WORKING TIME IN THE CAFETERIA AND COFFEE SHOP OF THE HOSPITAL

The Board, with court approval, has long held that an Employer may not lawfully adopt a rule prohibiting employee solicitation of Union membership during non-working time or prevent distribution of Union literature during non-working time in non-working areas, absent special circumstances. Republic Aviation Corp. v. NLRB, 324 U.S. 793; NLRB v. Magnavox Company, 415 U.S. 322; Stoddard-Quirk Mfg. Co., 138 NLRB 615.

Hospitals contended however that because of their unique status in providing services to the ill and infirm, the Board should adopt a special rule applicable to such institutions which would permit them to prohibit solicitation and distribution by employees on their non-work time in all areas to which the public and patients have access. The Board, in St. John's Hospital and School of Nursing, Inc., supra, held that since "the primary function of a hospital is patient care," a "tranquil

atmosphere is essential to the carrying out of that function." Sl.Op. p.3, 91 LRRM at 1334. The Board concluded that a hospital may lawfully ban all employee solicitation, even during non-working time, in "strictly patient care areas" such as patient rooms, operating rooms and X-ray and therapy facilities.

However the Board rejected as too broad the position of the hospitals that all solicitation and distribution of Union literature be banned in all areas to which patients and visitors have access including cafeterias, lounges and the like. The Board held, on balance, that "the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit Union representation." Sl.Op. p. 4, 91 LRRM at 1334.

In the instant case, the Board, relying on its decision in the St. John's case, found that Beth Israel Hospital (hereinafter referred to as the "Hospital") violated Section 8(a)(1) of the Act by maintaining an overly broad no-solicitation/no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors had access. Beth Israel Hospital, 223 NLRB No. 188, 92 LRRM 1078. The First Circuit enforced the Board's order insofar as it related to the cafeteria and coffee shop, the only areas of the Hospital the court believed were focused upon at the hearing before the Administrative Law Judge. NLRB v. Beth Israel Hospital, 554 F.2d 477 (CA 1 1977).

Thus the Board in the St. John's

case, supra, reached an accommodation between the competing rights and interests of the hospital employees and their employers. While the National Union would have preferred that the traditional rules of the Board with respect to solicitation and distribution of literature be applied equally to health care employees, the Board's decision reaching the accommodation was well within its discretion as:

> "[T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 61 S.Ct. 845, 853-854, 85 L.Ed. 1271 (1941), and its special competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v.NLRB, 380 U.S. at 316, 85 S.Ct., at 966. Reviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that

meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266, 267.

The Hospital insists however, that the Board was required to uphold a ban on employee solicitation in all areas to which patients and visitors have access. The Hospital contends that Congress, when it extended the coverage of the Act to non-profit hospitals, clearly manifested its belief that the health care industry could not be treated in the same fashion as other industries, and that Congressional concern for uninterrupted patient care mandates rejection of the Board's order.

It is true of course that Congress recognized the special needs of health care institutions. Notice provisions dealing exclusively with such institutions were included in the Act to allow these institutions to prepare for labor disruptions. However the provisions added to the Act which deal exclusively with health care institutions do not relate to rules pertaining to solicitation or distribution. To the contrary, they pertain solely to the need of such institutions to maintain continuous service to patients.

Senator Williams, one of the sponsors of the legislation in the Senate which led to the 1974 Amendments to the Act noted as much when he stated:

"The prime concern of many witnesses who testified at our hearings on this bill was that hospitals be given protection against work interruptions that might cause injury or danger to patients.

Although we are convinced that the cause of the most prevalent and serious work disruption in hospitals - recognition strikes - will be eliminated simply by providing coverage of employees under the Taft-Hartley Act, we have added a number of provisions to the bill to accommodate the special need of the hospital industry to provide continuous quality service to patients." 120 Cong. Rec. 12938 (May 2, 1974, Remarks of Senator Williams).

Senator Javits, another sponsor of the legislation, commented on the special procedures which were added to the Act and which related solely to the health care industry:

". . . Of course, we all understand the critical community needs which health care institutions fulfill. The important question in this bill then is, what recognition should be given to the special situation involving the health - indeed the life and death of people? Some special procedures have to be mandated to avoid the disruptions of essential health care services

because of labor-management strife.

Mr. President, I should like to detail to the Senate three such provisions in the bill. First, the bill requires a 90-day rather than a 60-day notice of intention to reopen a contract upon its termination to be given to the Federal Mediation and Conciliation Service. In addition, at least 30 days notice must be given to the FMCS before any strike or lockout occurs in connection with the first contract.

The second item of safeguard is mandatory mediation by the Federal Mediation and Conciliation Service. In all other cases, it is voluntary; here it is mandatory. That makes a big difference, because it gets the U.S. Government into the picture immediately.

Third and last, 10 days notice of any strike or picketing, including stranger picketing, must be given to a health care institution. The committee report spells out in some detail the intention of the committee as to how this special provision should be interpreted and administered by the NLRB in order to guard against its abuse either by unions or employers." 120 Cong. Rec. 12939 (May 2, 1974, Remarks of Senator Javits).

None of these unique provisions even remotely deals with solicitation and distribution rules. Since Congress did not enact any limitations on employee solicitation rights in the health care industry, the Board was free to make the accommodation it reached in this case.

Moreover, the Hospital and those courts which agree with its position with respect to the legislative history of the 1974 Amendments, see e.g., St. John's Hospital and School of Nursing v. NLRB, 557 F.2d 1368 (CA 10 1977), completely ignore the fact that the major purpose of the amendments was to confer upon employees of non-profit health care institutions all of the rights guaranteed to other employees already covered by the Act. The House Report, No. 93-1051 stated with reference to the health care amendments:

> "The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees. Indeed, the Committee could find no reason why 1,427,012 employees of these nonprofit hospitals - representing 56% of all hospital employees - should continue to be excluded. H. Rept., No. 93-1051, 93rd Cong. 2d Sess., p.4.

See also S. Rept., No. 93-766, 93rd Cong. 2d Sess., p. 3.

When the Senate was considering the conference report, Senator Williams discussed the principal purpose of the amendments in the following language:

> "During the course of the recent debates the principal purpose of the bill - the extension of collective bargaining rights, was never the subject of serious challenge or controversy. Hopefully this unanimity will be interpreted to mean that employees of nonprofit hospitals will no longer have to maintain their status as second-class citizens in this area of labor relations." 120 Cong. Rec. 22574 (July 10, 1974, Remarks of Senator Williams).

See also, 120 Cong. Rec. 16900 (May 30, 1974, Remarks of Representative Ashbrook); 120 Cong. Rec. 22578 (July 10, 1974, Remarks of Senator Javits); 120 Cong. Rec.22579 (July 10, 1974, Remarks of Senator Taft).

Clearly then, Congress' intention was to treat health care employees in the same manner as all other employees except where special provisions were enacted to ensure against interruptions of patient care because of strikes or picketing. Congressional concern did not extend to solicitation and distribution rules.

The Hospital also contends that the Board erred in placing restrictions on hospitals that it does not place on retail stores and restaurants. In retail stores the Board has held that employers may prohibit solicitation on the selling floor

and in other public areas. May Department Stores Co., 59 NLRB 976, enf'd. 154 F.2d 533 (CA 8 1946). In restaurants the Board has permitted prohibitions on solicitation insofar as they apply to customer areas or areas within visual or auditory range of customers. McDonald's Corp., 205 NLRB 404. The reason for the modification of the Board's general rule pertaining to solicitation and distribution for retail stores was set forth in May Department Stores Co., supra, at p. 981:

> "We perceive no reasonable basis for distinguishing between the two types of enterprises so far as concerns a general prohibition against union solicitation by employees during non-working hours at all places on the respondent's premises. The respondent has adduced no convincing evidence that such blanket injunction bears reasonable relation to the efficient operation of its business. However, we do see reasonable ground for prohibiting union solicitation at all times on the selling floor. Even though both the solicitor and the person being solicited are on their lunch hour, for example, the solicitation, if carried on on the selling floor, where customers are normally present, might conceivably be disruptive of the respondent's business. We therefore find that the respondent's rule is invalid, and violative of the Act, only insofar as it prohibits union solicitation off the selling floor

during nonworking hours (such as luncheon and rest periods)."

The exception for retail stores and restaurants is applicable to commercial enterprises to ensure their survival. Manifestly the Board was not required to extend the exception to health care facilities. In Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F.2d 208, 214 (CA 7 1977) the court cogently set forth the reasons why the Board's distinction between solicitation in retail stores and hospitals should be upheld:

> "In our judgment the distinction the Board has now drawn between hospitals and retail stores or restaurants is far from arbitrary. A retail store's or a restaurant's primary function is selling merchandise. The sales floor of a store and the public area of a restaurant are where either business carries out the sale of merchandise, and are also where the public deals with the employees in their professional capacity. Thus, insofar as union organizational activities create an abnormal atmosphere on the sales floor or in public areas, they interfere with the employees' job performance and disrupt the store's or restaurant's performance of its primary function.
>
> By contrast, the primary function of a hospital is to provide health care, and the areas of a

> hospital outside of immediate patient care areas are by definition not locations where the hospital's primary function is carried out or where the public deals with the employees in their professional capacity. Thus, while organizational activities conducted outside of immediate patient care areas might create an abnormal atmosphere where they took place, they would not interfere with the employees' job performance and therefore could not disrupt the hospital's performance of its primary function."

The Board, in light of the legislative history, and its experience in the health care industry, was correct in refusing to unduly restrict employee rights in the health care field. The Board properly accommodated the rights of employees, employers and patients and its decision as enforced by the court below should be upheld.

Conclusion

For the above stated reasons, the order of the court below enforcing the order of the Board should be affirmed.

Respectfully submitted,

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CONSENT TO FILING AMICUS CURIAE BRIEF

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, to the filing in this proceeding with the Supreme Court of the United States of an amicus curiae brief on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO.

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